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UTHAYAKUMAR PONNUSAMY v. INSPEKTOR MOHAMAD FAIROL ABU BAKAR & ANOR

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
GUNALAN MUNIANDY JCA
B HASHIM HAMZAH JCA
[CRIMINAL APPEAL NO: W-05-76-03-2021]
18 FEBRUARY 2022

C **Abstract** – *The criminal justice system requires separation of duties between those who investigate and those who prosecute. The issuance of notice, under s. 111 of the Criminal Procedure Code, is a procedure laid down in law where a police officer, in the course of making an investigation, may, by order in writing, require the attendance of a person before himself or any person to assist with the investigation. The* D *Attorney General has no power to review a notice under s. 111, which concerns an investigation, as he is only empowered to have control and direction of criminal prosecutions and proceedings per se and not of the investigations of an offence.*

E ***CRIMINAL PROCEDURE:*** *Police investigation – Notice – Lawyer posted on Facebook account about disabled child denied right by Jabatan Kebajikan Masyarakat – Police issued lawyer with two notices under s. 111 of Criminal Procedure Code – Whether s. 111 notices must be served by same police officer that issued notices – Whether s. 111 notices issued mala fide and oppressive – Whether* F *Attorney General could review and set aside s. 111 notices*

CONSTITUTIONAL LAW: *Attorney General – Powers and prerogatives – Whether Attorney General seized with power to review and set aside notice under s. 111 of Criminal Procedure Code*

G The appellant, a lawyer, had handled a case which involved shooting of men ('shooting case') and had written nine letters to the police disputing their version of the events. His last letter was titled 'Indian Lives Matter in Malaysia Civil Suit Prosecute Police Crime and Racial Injustices: Hindraf 2.0 170 days police kidnap cum shot dead Moganambal and three others ala H George Floyd, USA'. The appellant later received a SMS from the first respondent, who introduced himself as a police inspector, telling the former to contact the latter. The first respondent also called the appellant twice but the latter chose not to answer the calls and, instead, sent a message to the first respondent to write in officially. The first respondent replied and sent a I notice under s. 111 of the Criminal Procedure Code ('CPC') ('s. 111 notice') *via* WhatsApp and email ('first notice'). To his surprise, the first notice was not about the shooting case. The appellant then sent a letter to the Attorney General ('AG'), to review and reconsider the first notice, but, instead, the

appellant was served, this time personally, with another s. 111 notice ('second notice'). The respondent clarified that the notices concerned a posting that the appellant made on his Facebook account about a disabled child being denied his right by the Jabatan Kebajikan Masyarakat; the notices were not in relation to the shooting case. This prompted the appellant to apply to the High Court, to set aside and/or strike out the s. 111 notices and to stay any warrant of arrest to be issued against him for failing to comply with the said notices. In support of his application, the appellant submitted that the s. 111 notices were (i) oppressive, *mala fide* and designed to dissuade or prevent him from carrying out his duties as an advocate and solicitor; and (ii) null and void and of no effect as they were not served by the same police officer that issued it. Dismissing the appellant's application, the High Court Judge held that (i) there was nothing in s. 111 of the CPC that imposed the requirement that the s. 111 notice must be served by the same police officer that issued it; (ii) it would be efficient to enable the police to utilise another officer to serve the s. 111 notice and not impose such obligation on the officer that issued the notice; (iii) the first respondent issued the second notice and served it personally on the appellant out of caution; and (iv) the appellant's fear of being stopped from carrying out his duties as an advocate and solicitor was unfounded as the police was entitled to investigate any matter within their purview and the confinements of the law. Hence, the present appeal. The issues that arose for determination were: (i) whether the s. 111 notices served were *mala fide* and oppressive; and (ii) whether the AG had the power, pursuant to s. 376(1) of the CPC, to set aside the s. 111 notices.

Held (dismissing appeal)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The issuance of the first notice should be regarded as an advance notice given to the appellant. The official notice was the one served personally on the appellant, which was the second notice. The service of the second notice was in accordance with the law. The issuance of notice under s. 111 of the CPC was a procedure laid down in law where a police officer, in the course of making an investigation, may, by order in writing, require the attendance of a person before himself or any person to assist with the investigation. There was nothing in s. 111 of the CPC that imposed the requirement that a s. 111 notice must be issued and served by the same police officer. Since the appellant made a posting on his Facebook account that a disabled child was denied his right by the Jabatan Kebajikan Masyarakat, it justified the action taken by the respondents in starting an investigation. There was no malicious intention, or *mala fide,* on the part of the respondent as it was just a procedural mode to request the appellant to assist with the investigation. The second notice was effective. Section 111(2) of the CPC becomes operative if there is any failure on the part of the appellant to obey the order. (paras 28, 30, 35 & 43)

(2) The AG was only empowered to have control and direction of criminal prosecutions and proceedings *per se* and not of the investigations of an offence. The AG had no power to review the s. 111 notices as it was in respect of an investigation. The AG and his deputies were not involved in the investigation process. Their involvement at the investigation stage was merely to direct the relevant authorities to conduct further investigations if the need arises. The criminal justice system requires separation of duties between those who investigate and those who prosecute. (paras 38 & 39)

Case(s) referred to:
Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 1 LNS 89 FC ***(refd)***
Borhan Hj Daud & Ors v. Abd Malek Hussin [2010] 8 CLJ 656 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***
Uthayakumar Ponnusamy v. PP [2003] 2 CLJ 549 HC ***(refd)***
Uthayakumar Ponnusamy v. PP [2005] 7 CLJ 466 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 111(2), 112, 376(1)
Federal Constitution, arts. 5, 8, 10, 11, 145(3)
Legal Profession Act 1976, s. 42

For the appellant - M Manoharan, P Subramaniam, Anis Salihah Abdul Malek & Arivom Namasivaya; M/s M Manoharan & Co
For the respondents - Baizura Kamal & Mohd Khushairy Ibrahim; DPPs

[Editor's note: For the High Court judgment, please see Uthayakumar Ponnusamy v. Inspektor Mohamad Fairol Abu Bakar & Anor [2021] 1 LNS 507 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] This is the appellant's appeal against the decision of the High Court which has dismissed his application in encl. 1 to set aside and/or strike out the notices under s. 111 of the Criminal Procedure Code dated 15 June 2020 and 17 August 2020. The respectively appellant is also seeking a stay of any warrant of arrest to be issued against him for failing to comply with the notices.

Facts Of The Case

[2] The appellant averred in his affidavit in support of his application dated 21 August 2020 that he had been a lawyer for the past 28 years. He had recently taken on a case representing two widows, where their husbands were in a party of three men shot dead by the police. The wife of the third man was allegedly at the scene too and had gone missing. The appellant disputed the police's version of events and had written nine letters to the

police which received no response. His last letter was dated 10 June 2020, titled "Indian Lives Matter in Malaysia Civil Suit Prosecute Police Crime and Racial Injustices: Hindraf 2.0 170 days police kidnap cum shot dead Moganambal and 3 others' ala George Floyd, USA". The appellant received a message from the first respondent to his mobile phone, which read "Selamat petang tuan. Saya Inspektor Fairol dari Unit Siasatan Jenayah Terkelas, Bukit Aman ... jika dapat sms ini … minta hubungi saya semula". The first respondent had called the appellant twice, on 13 June 2020 and on 15 June 2020, presumably because the appellant did not respond to the message. The appellant chose not to answer the calls but sent a message to the first respondent saying "Please write in officially. Thank you". The first respondent replied by stating that he merely wanted to serve a notice under s. 111 of the CPC. The first respondent did serve the s. 111 notice on the appellant through an e-mail and WhatsApp on the same day ("the first notice"). The appellant averred that he was taken aback to discover that the first notice was about another case that he handled, concerning a destitute Indian family, which had since been reported by a local Tamil newspaper. He then instructed his solicitors to send a letter to the Attorney General to review and reconsider the first notice. That led to nothing as he was served personally with another s. 111 of the CPC notice on 17 August 2021 "(the second notice"). The appellant averred that he was unable to carry out his duties as an advocate and solicitor without fear or favour in light of what he claimed to be the police's alleged persecution against him.

[3] The respondents in their affidavit in reply dated 27 October 2020 affirmed by the first respondent denied all the allegations and maintained that they had merely carried out their duties as prescribed by law. The first notice was sent to the appellant by e-mail pursuant to his request and they had served the second notice personally out of an abundance of caution. The respondents averred that they are not pursuing the appellant for the shooting case of the three men. They wanted to investigate him for a post that he put on his Facebook page on 7 April 2020 of a destitute Indian family.

[4] It is the appellant's case that the first notice and then the second notice issued by the police under s. 111 of the CPC are oppressive and *mala fide*, and designed to dissuade or prevent him from carrying out his duties as an advocate and solicitor. The appellant referred to the case of *Uthayakumar Ponnusamy v. PP* [2005] 7 CLJ 466; [2005] MLJU 387 (HC), which says that the notice must be issued and served by the same police officer, namely the investigating officer and the court held that the failure to ensure the police officer who served the notice was the same officer who signed it rendered, the applicant's detention under s. 111(2) of the CPC to be declared to be unlawful. Similarly, in the present case the first notice and the second notice under s. 111 of the CPC by the respondents are null and void and of no effect and therefore ought to be set aside.

A **Findings Of The High Court**

[5] The learned judge was disinclined to agree with the proposition that the s. 111 of the CPC notice must be served by the same police officer that issued it. There is nothing in s. 111 of the CPC that imposes that requirement. The only provision that requires the same police officer is
B s. 111(2) of the CPC, where he is to be the one reporting to the Magistrate should the person concerned refuse to comply with the notice. The police should not be unduly constrained. It would make for efficacy to enable the police to utilise any other officer to serve the s. 111 of the CPC notice, and not impose that obligation on the officer that issued the notice. The case does
C not support the appellant's proposition that the two notices issued by the respondents are oppressive. The learned judge accepted the first respondent's explanation that he had only decided to issue the second notice and served it personally on the appellant out of an abundance of caution. This is because he had only served the first notice on the appellant *via* e-mail and WhatsApp.
D Appellant's fear of being stopped from carrying out his duties as an advocate and solicitor is unfounded. The police are entitled to investigate any matter within their purview and the confinements of the law. This country would face calamity if the police are shackled from investigating. The appellant's application is unmeritorious and is, therefore, dismissed.

E **The Appeal**

[6] We heard the appellant's submissions oral and written and the replies from the Deputy Public Prosecutor representing the respondents ("the DPP"). Having considered the submissions which focus on the point of law relating to notices issued under s. 111 of the CPC dated 15 June 2020 and
F 17 August 2020 respectively against the appellant by the respondents which the appellant claims the notices are null and void and must be set aside in respect of all proceedings and investigation against the appellant, we are of the considered view that the appeal has no merit. We have read through cases cited in the submissions and the grounds of the learned judge. However, we
G agree with the contention of the learned DPP that there is no illegality or invalidity in law in respect of the said notices issued under s. 111 of the CPC. We therefore unanimously hold that the learned judge had not erred in law or in fact in dismissing the criminal application to set aside both notices on the ground of illegality. We dismiss the appellant's appeal. We give our
H reasons.

Appellant's Submission

[7] The appellant is required to summarise the facts of his case because, in the written submissions, there are lengthy statements or allegations made against the respondents. The allegations are repetitions of what the appellant
I had averred in his affidavit in support of his application dated 21 August

2020. We also believe that at the High Court, the learned judge has considered the averments made by the appellant and the respondents and made his finding. At our end, we are interested to hear the point of law relating to the issuance of the first notice and second notice under s. 111 of the CPC whether both notices are defective to render them as null and void and of no effect on the appellant.

[8] Be that as it may, the appellant submitted that the notices under s. 111 of the CPC against the appellant are non-starters due to the reason that the appellant did not commit any crime and/or wrongdoings to be investigated by the respondents and in fact the appellant is a Public Interest Human Rights Lawyer which is also in the public domain. The appellant submitted that the respondents are not acting in good faith to the appellant and there was gross injustice to the victims for various reasons as averred in his affidavit. Based on the facts, laws and authorities, the appellant submitted that there is an injustice happening towards the appellant specially intended to muddle and/or stop the appellant from carrying out the appellant's duties and responsibilities as an advocate and solicitor.

[9] As alluded to earlier, we wanted to hear the point of law regarding s. 111 of the CPC notice.

[10] The appellant submitted that there are two notices under s. 111 of the CPC dated 15 June 2020 and 17 August 2020 whereby both are concerning the same issues and matters and were both from the first respondent to the appellant which shows a wrong act, and with that null and void according in laws based on the authority of *Uthayakumar Ponnusamy v. PP* (*supra*) which was held as follows:

> For the reasons above, and since the issuance of any warrant of arrest (s. III(ii) CPC) involves liberties of individual entrenched in our Federal Institution, and there can be two possible interpretations as to who should properly be construed as "a police officer" within the context of section III(i) CPC, the one that was adopted by Inspector Narolliza should be endorsed to be the correct one and not as adopted by D.S.P. Gan. As such, and on that premise, I held that UK-11 (Section 111 Notice) was not properly issued and be cancelled forthwith. Consequentially, any detention flowing from the issuance of UK-11 and the likes would have been unlawful.

[11] The appellant referred to s. 111 and s. 112 of the CPC as follows:

> s. 111 CPC
>
> (1) A police officer making an investigation under this Chapter may by order in writing require the attendance before himself of any person who from the information given or otherwise appears to be acquainted with the circumstances of the case, and that person shall attend as so required.

A s. 112 CPC

> (1) A police officer making a police investigation under this Chapter may by order in writing require the attendance before himself of any person who from the information given or otherwise appears to be acquainted with the facts and circumstances of the case and shall reduce in writing any statement made by the person so examined.

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[12] The appellant submitted that the respondent had failed to serve a copy of the first information report to prove that the appellant was "acquainted with the facts and circumstances of the case ..." which in any event is a public document for the appellant to obtain the necessary legal advice from the C appellant's solicitor and for the appellant's further action.

[13] The appellant submitted that in the Federal Court case of *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 1 LNS 89; [1977] 2 MLJ 24 before Suffian LP, Raja Azlan Shah and Wan Suleiman FJJ, it was decided that:

D

> ... though Section 76 of the Evidence Act is silent as to the right of a person to inspect a First Information Report, it is clear that under the common law the appellant has that right as he is a person interested in it and inspection is necessary for the protection of his interest. The first information report is admissible as evidence in the criminal trial under E section 157 of the Evidence Act and therefore the appellant or his counsel should be supplied with a copy.

[14] The appellant submitted that it is wrong for the respondents' to refuse to wait for the official reply and/or decision from the Attorney General even though s. 376(1) of the Criminal Procedure Code (states that "The Attorney F General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code" and art. 145(3) of the Federal Constitution states that, "The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence ...".

G **[15]** The appellant submitted that the appellant is only a lawyer and in fighting for justice the appellant has no choice but to face the respondents who have the power in the execution or administration of justice, therefore, the appellant is helpless if the respondents were to act in bad faith and abuse their powers.

H **[16]** In another case between the appellant and the second respondent, to quote Justice Suriyadi Halim Omar's (as he then was) judgment in *Uthayakumar Ponnusamy v. PP* [2003] 2 CLJ 549; [2003] 5 MLJU 433 at p. 564 (CLJ); p. 9 that "... here was a mere man, armed without any resources except enthusiasm, who had the temerity in an unguarded moment, I having picked on no less than a personnel of another powerful state institution, backed by equally powerful resources". (The court accordingly dismissed the criminal charges for being groundless).

[17] Based on the submissions above, it is clear that the appellant is muddled and/or stopped from carrying out the appellant's statutory duties without fear or favour and without regard to his own interest according to s. 42 of the Legal Profession Act 1976 and arts. 5, 8, 10 and 11 of the Federal Constitution.

[18] The appellant submitted that following the respondents' action, the appellant did not give any opinion and/or legal advice and/or general comment regarding the rule of law, administration of justice and the sovereignty of the law and did not get to exercise the appellant's legal and constitutional rights as a lawyer in defending and preserving the rule of law, public interest and fighting for law and justice.

[19] Based on the facts, laws and authorities stated above, the appellant submitted that it is clear that there is an injustice happening towards the appellant specially intended to muddle and/or stop the appellant from carrying out the appellant's duties and responsibilities as an advocate and solicitor and, if this appeal is not allowed by this court, it will send a wrong signal to the respondents who are in power that the respondents are in effect above the law and not accountable for even the loss of human lives in their hands and that they can continue abusing their powers and acting with impunity without checks and balances even by the Legal Profession that is clearly against the law and spirit of the Federal Constitution.

[20] Wherefore, the appellant prays for this appeal to be allowed and the decision of the High Court to be set aside; and accordingly the appellant's application be allowed.

The Respondents' Submission

[21] The learned DPP submitted that the notices dated 15 June 2020 (which were sent to the appellant *via* email and WhatsApp) were advance notices and that the notice dated 17 August 2020 was the official notice which was served personally on the appellant by the first respondent. Thus, the notice dated 17 August 2020 is effective and due to the failure on the part of the appellant to obey the order, the court can invoke s. 111(2) of the CPC.

[22] The learned DPP also submitted that the notices under s. 111 of the CPC by the respondents which were served on the appellant were made in accordance with law and are valid. The learned judge accepted the first respondent's explanation that he only decided to issue the second notice and served it on the appellant personally out of an abundance of caution.

[23] On the AG's power under s. 376(1) of the CPC, the learned DPP submitted that the AG is only empowered to have control and direction of criminal prosecutions and proceedings *per se* and not in the investigation of an offence. The AG has no power to review the notice issued under s. 111 of the CPC as it was in the course of an investigation.

[24] The learned DPP also submitted that the appellant's contention that the failure on the part of the first respondent to reply in his affidavit in respect of his request for police reports, exhibits, letters and documents, is a fishing expedition as the appellant cannot take this route to get information from the police at this juncture. All the other matters as stated in the appellant's affidavit were also unfounded.

Decision Of This Court

[25] The appellant sought to declare the notices issued by the respondents under s. 111 of the CPC dated 15 June 2020 and 17 August 2020 respectively as null and void and be set aside in respect of all proceedings and investigation against the appellant.

[26] Having heard the submissions, there are two issues for determination as follows:

(i) whether the notices served on the appellant on 15 June 2020 (*via* email and WhatsApp) (first notice) and on 17 August 2020 (second notice) respectively by the first respondent were *mala fide* and oppressive;

(ii) whether the Attorney General (AG) has power under s. 376(1) of the Criminal Procedure Code to set aside the first and second notices against the appellant.

[27] We have read the records of appeal and the grounds of judgment of the learned judge. We have also considered the argument presented by the appellant and the learned DPP for the respondents.

The First Issue

[28] On the first issue, with the established facts, it is our considered view that the issuance of the first notice dated 15 June 2020 should be regarded as an advance notice given to the appellant. The official notice is the one served personally on the appellant which was the second notice dated 17 August 2020. The service of the subsequent notice in our considered view is in accordance with the law.

[29] It is not disputed that the first notice, which was the advance notice as agreed by the appellant to be sent *via* email as per the WhatsApp communication as per exh. MF2 in the first respondent's affidavit where the appellant gave his e-mail address to enable the first respondent to send the notice as an advance notice which was followed by the official notice on 17 August 2020 *via* personal service. We are satisfied that there is no malice whatsoever as the contents of the notices were the same as shown below:

(Polis 45 - Pin. 1/84) **20**

POLIS.....

ARAHAN MENGHADIRI PENYIASATAN DI BAWAH SEKSYEN 111, KANUN ACARA JENAYAH (CAP. 6)

Kepada UTHAYAKUMAR A/L PONNUSAMY
611107075815

AMBIL INGATAN bahawa anda adalah dikehendaki menghadirkan diri anda di dalam Penyiasatan Polis mengenai Seksyen 4(1) Akta Hasutan / 505(b) KK / 233 AKMM 1998

di Pejabat Unit Siasatan Jenayah Terkelas D5 Bukit Aman

pada jam 1000 hrs Pagi / ~~Petang~~ hari 19/6/20

....., 20.....

Nombor Report JTR / 2852/20

Bertarikh 8/4/20

Tarikh 15 hb 06 2020

(MOHAMAD FAIROL ABU BAKAR) INSP
INSP. UNIT SIASATAN JENAYAH TERKELAS
JABATAN SIASATAN KRIMINAL
BUKIT AMAN
Tandatangan

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(Polis 45—Pin. 1/84)

POLIS.....

ARAHAN MENGHADIRI PENYIASATAN DI BAWAH SEKSYEN 111, KANUN ACARA JENAYAH (CAP. 6)

D

Kepada Uthayakumar A/L Ponnusamy 611107 5815

AMBIL INGATAN bahawa anda adalah dikehendaki menghadirkan diri anda di dalam Penyiasatan Polis mengenai Seksyen 411 Akta Kanun 1948/505(L) kt/233 Akmm 1998

di Pejabat Unit Siasatan Jenayah Terkelas Bukit Aman pada jam 1000 HRS Pgi/Ptg hari 25/8/2020

.....20.....

Nombor Report JTK - 2852/20

Bertarikh 8/4/20

Tarikh 17 hb. 8 2020

MOHAMAD FAIROL ABU BAKAR #1437
INSP. UNIT SIASATAN JENAYAH TERKELAS
JABATAN SIASATAN JENAYAH
BUKIT AMAN

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[30] For all intents and purposes, the issuance of notice under s. 111 of the CPC was a procedure laid down in law where a police officer in the course of making an investigation may by order in writing require the attendance of a person before himself or any person to assist with the investigation. We agree with the learned DPP that since the appellant made a posting in his Facebook account that an OKU child was denied his right by JKM, it justifies the action taken by the respondents in starting an investigation. Again, we fail to see any malicious intention or *mala fide* on the part of the respondents as alleged by the appellant as it was just a procedural mode to request the appellant to assist with the investigation.

[31] The first respondent in his email to the appellant says:

> Selamat Pagi Tuan,
>
> Pohon tuan untuk hadir bagi membantu siasatan. Sesalinan seksyen 111 KTJ dilampirkan.

[32] The first respondent in his affidavit in reply at paras. 8 and 12 stated that:

> (8) Sebagai balasan kepada Perenggan 13 Afidavit Sokongan tersebut saya telah membuat panggilan telefon kepada Pemohon pada 15.6.2020 bagi tujuan menyerahkan Notis di bawah seksyen 111 Kanun Tatacara Jenayah. Tiada sebarang desakan daripada saya ke atas Pemohon dan panggilan juga tidak dijawab oleh Pemohon. Tujuan panggilan dibuat juga telah dimaklumkan melalui aplikasi WhatsApps apabila Pemohon menghantar mesei melalui applikasi WhatsApps.
>
> [12]: Perenggan 18 Afidavit Sokongan tersebut dipertikai kerana tiada unsur niat jahat daripada pihak saya. Serahan kali kedua di bawah Seksyen 111 Kanun Tatacara Jenayah pada 17.8.2020 adalah dilakukan secara ke diri ke atas Pemohon bagi memastikan ia adalah di serah secara sah dan mengikut kehendak undang-undang.

[33] Based on the above facts, we are satisfied that the notices under s. 111 of the CPC by the respondents which were served on the appellant were made in accordance with the governing law and are valid. The same set of facts have been considered by the learned judge and he accepted the first respondent's explanation that he only decided to issue the second notice and served it on the appellant personally out of an abundance of caution.

[34] Section 111 of the CPC states as follows:

(i) A police officer making an investigation under this chapter may by order in writing require the attendance before himself of any person who from the information given or otherwise appears to be acquainted with the circumstances of the case, and that person shall attend as so required.

(ii) If any such person refuses to attend as so required that police officer may report such refusal to a Magistrate who may thereupon in his discretion issue a warrant to secure the attendance of that person as required by such order.

[35] The appellant argued that the notice must be issued and served by the same police officer. The learned judge was disinclined to agree with the appellant. Having read s. 111 CPC, we agree with the learned judge that there is nothing in s. 111 CPC that imposes that requirement. The only condition that is required of the same police officer is under s. 111(2) CPC, where he is to be the one reporting to the Magistrate should the person concerned refuse to comply with the notice. As correctly stated by the learned judge, the case referred to by the appellant does not support the appellant's proposition that the two notices issued by the respondents are oppressive.

[36] We agree with the learned DPP's submission that if at all a warrant of arrest were to be issued against the appellant for failure to comply with the notice under s. 111 of the CPC, then the second notice will be effective as it was served personally on the appellant in accordance with the provisions of the law.

The Second Issue

[37] Whether the AG has power under s. 376(1) of the CPC to set aside the first and second notices against the appellant. Firstly, it is not disputed that the AG is empowered under art. 145 of the Federal Constitution to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial. Secondly, the word "proceedings" means "judicial proceedings" and does not include investigation. The provision of s. 376(1) of the CPC reads:

> the Attorney General shall be the Public Prosecutor and shall have the control and direction of **all criminal prosecutions and proceedings** under this Code. (emphasis added)

[38] Thus, the AG is only empowered to have control and direction of criminal prosecutions and proceedings *per se* and not of the investigation of an offence. The AG has no power to review the notice issued under s. 111 of the CPC as it was in respect of an investigation.

[39] Thus, it was rightly so pointed out by the learned judge that the AG and his deputies are not involved in the investigation process. Their involvement at the investigation stage is merely to direct the relevant authorities to conduct further investigations if the need arises. The criminal justice system requires separation of duties between those who investigate and those who prosecute as per the decision in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] 5 MLJ 623, of the Court of Appeal at p. 32:

> [73] We do not see how the above statement can amount to GSR being involved in the investigations of the cases that he is to prosecute. Investigation powers are vested with the relevant agencies, e.g. the police (PDRM) for offences under the Penal Code, the MACC for offences under the MACC Act 2009 and the Securities Commission for offences under the Securities Commission Malaysia Act 1993. However, when the investigation process is completed, the IPs will be submitted to the DPPs to charge if there is sufficient evidence to formulate a charge. There has been occasion that the DPPs will instruct the investigation officer to do further minor investigations, usually to clarify matters. But that does not amount to the DPPs getting involved in the investigation on the ground or investigating the case itself. This role is only to ensure that the investigation is carried out in a fair manner and without fear and favour and to ensure that any criminal proceeding is only to be instituted against any person where investigation into the offences has been completed, but never to usurp the powers of the investigating agency.

[40] Rightly so the AG would not interfere in any investigation undertaken by the police for the obvious reason that the AG and the police are under two separate organisations with separate powers and responsibilities under the law. In *Borhan Hj Daud & Ors v. Abd Malek Hussin* [2010] 8 CLJ 656, the Court of Appeal held that:

> [53] With utmost respect, we are of the view that the unwillingness of the DPP to charge the respondent for making false report cannot be used as a basis to infer that the DPP and the police were trying to cover up the case. **It is an established fact that the DPP and the police are under two separate organizations, with separate powers and responsibility under the law.** There is no necessity for the DPP to explain to the court as to the delay in making the decision in not charging the respondent. In this respect, the learned High Court judge had overstepped his duty when he made such statement which can be understood to mean that if there is a delay in investigation and in making a decision to prosecute an offender, it must be presumed that the police and the DPP were working together in cahoots to conceal the truth and that they were acting in *mala fide.* Such allegations are very serious allegations which require proof and not mere inferences. (emphasis added)

[41] We agree with the learned DPP's submission that the notice under s. 111 of the CPC is just an official mode of asking a person to assist the police to investigate crime or a would be offence and since the appellant wants justice for the OKU child then he needs only to co-operate with the police so that the matter which he posted can be investigated and justice can be seen to be done.

[42] As rightly pointed out by the learned judge in his judgment, that the duty to investigate could not be deemed as oppressive conduct as this country would face calamity if the police are shackled from investigating and that they (the police) have thus far acted in accordance with the law.

A

Conclusion

[43] Based on the aforesaid, it is our considered view that the notice dated 15 June 2020 (which was sent to the appellant *via* email and WhatsApp) was an advance notice and that the notice dated 17 August 2020 was the official notice which was served personally on the appellant by the first respondent. The notice dated 17 August 2020 is effective and any failure on the part of the appellant to obey the order, s. 111(2) of the CPC becomes operative.

B

[44] In the result, we find the appellant's appeal has no merit in law or fact. The appeal is accordingly dismissed.

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